80115-1

No. 80115-1

SUPREME COURT
OF THE STATE OF WASHINGTON

THURSTON COUNTY,

Petitioner,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD and 1000 FRIENDS OF WASHINGTON,

Respondents

and

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, OLYMPIA MASTER BUILDERS, and PEOPLE FOR RESPONSIBLE ENVIRONMENTAL POLICIES,

Petitioner-Interveners.

CLALLAM COUNTY'S MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Growth Management Act, Ch. 36.70A RCW ("GMA") delineated a sequence of growth planning steps for jurisdictions planning under the Act, beginning with the most fundamental land use classifications and following through to the development regulations and infrastructure requirements that support growth management objectives within each land use element. RCW 36.70A.040. As jurisdictions worked through the requirements, each step involved a public process and legislative adoption, which was then subject to a limited appeal period. RCW 36.70A.290. This framework allowed the legislative bodies responsible for implementing the Act to rely upon the legal certainty of unchallenged actions, as well actions that are challenged but ultimately found to comply with the Act.

Yet in interpreting the GMA update provision of RCW 36.70A.130, the Court of Appeals, Division II, contradicted both the intent and the specific language of the Act, subjecting local jurisdictions to unending litigation over their land use plans. *Thurston County v. W. W Wash. Growth Mgmt Hearings Bd*, No. 34172-7-II, slip.op. (April 3, 2007). This result disregards the GMA's limitations upon growth management hearings boards ("Hearings Boards"), and undermines the long-term planning required by the GMA. Because this

appeal presents an issue of substantial public interest,[1] Clallam County urges this Court to grant Thurston County's Petition for Review.

II. ARGUMENT

Successful growth management requires the confidence of legislative decision makers and the regulated public that they can rely over the long-term upon the land use plans adopted in compliance with the GMA. *See, e.g.*, RCW 36.70A.3201 (expressing the legislature's intent that "the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community"). Once fundamental planning choices are made, local governments must be able to focus their resources on implementation, rather than expending those limited resources in continual legal battles over long-settled policy decisions. Public and private infrastructure investments must also be used to efficiently support coordinated growth without the threat that those investments may be undermined by untimely legal disputes.

The Court of Appeals' ruling conflicts with these GMA principles. Rather than respecting the finality of local planning

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[1] As persuasively argued in Thurston County's Petition for Review, the Court of Appeals' decision also conflicts with the decisions of this Court, providing another basis for this Court's review RAP 13.4(b). Because this issue is fully briefed by Thurston County, this memorandum focuses exclusively upon the public importance of issues raised in this appeal.

decisions, the opinion allows untimely challenges to all provisions of all land use plans. *Thurston County*, slip. op. at 12. Indeed, under the decision, even planning provisions that were not challenged upon adoption or amendment, or were previously upheld by a Hearings Board, are subject to renewed litigation.

A. The Decision Raises Substantial Issues of Public Interest.

The scope of the Court of Appeals' decision is immense, affecting literally all jurisdictions planning under the GMA. As this Court has recognized with other aspects of the GMA, the review requirements of RCW 36.70A.130 is less than crystal clear. The provision leaves open questions about the scope of review required, as well as which "legislative actions," if any, are subject to appeal upon completion of a jurisdiction's review. Because Thurston County met the earliest of the GMA's four staggered deadlines for periodic reviews, this appeal provides the first opportunity to construe the GMA update provisions of section .130 to effectuate legislative intent consistent with accepted principles of statutory construction. Whether the GMA is construed to empower jurisdictions to implement long-range planning or, alternatively, to subject them to the cost and risks of perpetual

litigation is undoubtedly an issue of substantial public interest, and warrants this Court's review. RAP 13.4(b).

1. The Decision Allows Hearings Board Challenges Unsupported by the GMA.

The Court of Appeals interpreted RCW 36.70A.130 to allow litigants to challenge *every* provision of *every* comprehensive plan, *every* development regulation, and *every* amendment *every seven years*. The decision allows challenges to land use plans no matter how long ago these provisions were adopted, regardless of whether such provisions were timely challenged, and regardless of whether such provisions have been upheld by prior Hearings Board decisions. The decision pays no heed to whether a change in GMA requirements adopted after a challenged ordinance would in fact trigger the need for review or update under section .130.

The GMA update provisions can be given meaning without accepting the sweeping Court of Appeals' ruling. Indeed, the ruling is unsupported by the language of section .130 and the statutory framework of the Act. Moreover, as well-briefed by Thurston County, the decision contravenes the limited appeal provision of RCW 36.70A.290.

If the legislature had intended all aspects of a jurisdiction's growth management plans to be subject to appeal under the update timelines, it would have unequivocally set forth this onerous requirement. *See 1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 180, 149 P.3d 616 (2006) (holding that referenda on GMA growth plans were not permitted because the GMA did not provide "any sort of allowance" that referenda could upset the GMA's "very strict [appeal] time schedules"). Yet neither the plain language of the update provisions of section .130, nor the appeal provision of section .290, provide for Hearings Board challenges to plan provisions for which the appeal period has passed.[2] Rather than mandating review and update of "every comprehensive plan provision" or "each development regulation," the legislature identified specific GMA planning requirements to be addressed. RCW 36.70A.130(1)(c) ("The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area ordinances and . . . an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management."). Similarly, other GMA amendments suggest that the review process was

[2] Tellingly, when the legislature amended the GMA to require "legislative action" to review land use plans, it did not amend the appeal provisions of section 290.

intended as a means to cause local governments to address new statutory requirements or new information.[3]

The common theme among elements called out for review by the legislature is that each provision involved statutory amendments adopted after 1995. Rules of statutory construction require this limiting theme to be given meaning, rather than construing the review to apply to every local decision ever adopted pursuant to the GMA. *See, e.g.*, *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) (noting that the primary goal of statutory interpretation is to give effect to the intent of the legislature).

If the Court of Appeals' decision is permitted to stand, it will require jurisdictions to continually re-defend once-settled land use decisions. The decision thus threatens to unleash a flood of GMA

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[3] *See, e.g.*, RCW 36.70A.070(9) ("It is the intent that new or amended elements [specified in the GMA, RCW 36.70A.070] after January 1, 2002, be adopted concurrent with the scheduled update provided in RCW 36.70A.130."); RCW 36.70A.131 (requiring "[a]s part of the review required by RCW 36.70A.130(1)" a review of mineral resource lands designations and development regulations, taking into account "[n]ew information made available since the adoption or last review of its designations or development regulations"); RCW 36.70A.367(8)(a) ("A county that has established or proposes to establish an industrial land bank pursuant to this section shall review the need for an industrial land bank within the county . . . during the review and evaluation of comprehensive plans and development regulations required by RCW 36.70A.130."); RCW 36.70A.530(2) (mandating that land use plans and regulations in the vicinity of a military installation be compatible, and requiring any necessary changes to accomplish such compatibility to be adopted or amended concurrent with the scheduled update provided in RCW 36.70A.130).

petitions, every bit as broad in scope as the initial deluge of GMA litigation arising from the inception of the Act.[4]

2. *The Sweeping Challenges Allowed Under the Decision Undermine the GMA.*

As part of the GMA framework, counties and cities were required, in sequence, to designate natural resource lands and critical areas, RCW 36.70A.060, urban growth areas, RCW 36.70A.110, to adopt comprehensive land use plans, RCW 36.70A.070, and finally to adopt implementing development regulations. RCW 36.70A.040. The order of planning steps dictated by the GMA encompassed a substantive logic, as each sequential decision built upon previous fundamental designations. After adoption, comprehensive plans, development regulations, and amendments may only be challenged before Hearings Boards when a petition for review is filed within sixty days after publication by the legislative body. RCW 36.70A.290(2). By providing a temporal restriction on the challenges that can be brought against a jurisdiction's land use decisions, the GMA promotes finality in planning for growth. *See, e g , McFarland,* 159 Wn.2d at 180 (recognizing "the

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[4]At the peak of Hearings Board litigation in 1995 and 1996, over 100 petitions for review were filed with the Hearings Boards. Washington St Growth Management Hearings Boards, 1st Ed. (1999).

general legislative policy recognized by this court that land use decisions should reach finality quickly").

This framework of legal certainty benefits local governments and property owners alike. Both can make infrastructure investments and development decisions in response to market demand, budget cycles and other appropriate considerations without fear that their plans may be undone by a new round of appeals with every periodic review. This finality allows local governments to invest in the public infrastructure necessary to encourage and accommodate appropriate growth and to comply with GMA requirements.[5]

As an example, the GMA's requirements for urban growth areas ("UGAs") demonstrate how the Court of Appeals' "reach-back" decision undermines the very purpose of the GMA.[6] A primary goal of the GMA is to "encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient

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[5] Clallam County recognizes that "planning is not a one-time thing", as expressed by this Court in *McFarland*, 159 Wn.2d 169 But process-driven plan revisions undertaken by a local legislative body in response to statutory amendments or policy evolution pose far-more manageable risks than the broad threat of third party litigation allowed by the Court of Appeals' decision.

[6] In *Quadrant Corp*, this Court noted that statutory interpretation requires "careful consideration" of the "purpose of the statute." 154 Wn 2d at 239. Accordingly, this Court declined to accept an interpretation of the GMA that "unnecessarily constrains the ability of local jurisdictions to plan and manage for . . growth". *Id*

manner." RCW 36.70A.020(1). Accordingly, the GMA requires counties to establish, in cooperation with their cities, urban growth area boundaries within which urban growth is encouraged. RCW 36.70A.110. To effectuate the goal of urban development, the GMA requires jurisdictions to provide the public facilities and services necessary to support UGA development. RCW 36.70A.020(12); .070(3); .070(6).

The UGA designation is intended to enable planning for a twenty-year growth horizon. *See* RCW 36.70A.110(2). Counties, cities, and citizens must be able to rely upon the continuity of these fundamental designations over time, and commit planning resources and infrastructure investments accordingly. The capital facilities plan element, for example, must include at least a six-year financing plan for the facilities necessary to support the land use element. *See* RCW 36.70A.070(3). Sewer and water comprehensive plans support the land use element, and are supported financially, in turn, by bond issues, concurrency regulations, and impact fees adopted and collected by local governments.

All of this investment in planning and infrastructure is now at risk if a UGA designation can be challenged long after expiration of the appeal period and where no change in the underlying UGA has been made. Similarly, untimely challenges to rural, natural, and resource land designations and policies will interfere with the planning of these important land use elements. No jurisdiction questions that when an ordinance is changed, that change is subject to challenge if an appeal is timely filed. But where no change is made, and a land use policy has been in place for years forming the basis for ongoing planning, it is antithetical to the GMA to allow a challenge. Had the legislature intended the update provision of RCW 36.70A.130 to have this effect, it would have expressly provided it. No such appeal was provided.

III. CONCLUSION

As other jurisdictions carry out the periodic reviews under RCW 36.70A.130, counties, cities, Hearings Boards, and lower courts will benefit from the direction of this Court regarding the scope of this statutory provision. This case presents an opportunity for this Court to address an issue of particular importance and preserve the ability of counties and cities to conduct effective land use planning. Accordingly, Clallam County urges this Court to accept Thurston County's Petition for Review.

DATE: July 2, 2007.

RESPECTFULLY SUBMITTED,

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